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No. 84-960 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ERNEST MENDEL and ALBERT MENDEL & SON, INCORPORATED,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF THE PETITIONERS

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No. 84-960

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October Term, 1984

ERNEST MENDEL and ALBERT MENDEL & SON, INCORPORATED,

Petitioners,

—against—

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REPLY BRIEF OF THE PETITIONERS

Petitioners hereby reply to the memorandum for the United States in opposition to the petition for a writ of certiorari in this matter, received by mail on January 19, 1985.

I. The government's memorandum in opposition to the petition of certiorari is significant in its omissions. Thus, the government fails to advise the Court that the instant case is the first to uphold venue under §1001 of Title 18 in a district other than the district of filing for hand delivered documents. Additionally, the government seeks to avoid the conflict which exists in the Circuits on this issue by artificially distinguishing the Fourth Circuit decision in *United States* v. *Reass*, 99 F.2d 752 (4th Cir. 1983) and by totally ignoring the Third Circuit District Court decisions of *United States* v. *Mischlich*, 310 F. Supp. 669 (D.N.J. 1970), *aff'd on other grounds*, 445 F.2d 1194 (3d Cir. 1971), *cert. denied*, 404 U.S. 984 (1971) and *United States* v. *Borow*, 101 F. Supp. 211 (D.N.J. 1951). Finally, the government cleverly avoids mentioning the fact that this Court's decision in *Travis* v. *United States*, 364 U.S. 631 (1961) has provoked multiple interpretations sufficient to totally becloud its meaning.

As noted above, the government's attempt to ignore a split in the Circuit Courts of Appeal, by distinguishing *Reass* in a footnote and arguing that it dealt with a repealed statute, fails.

Reass, supra, involved the filing of false statements in violation of a 12 U.S.C. §1441(a) which proscribed, in substance, the making of any statement, knowing it to be false, for the purpose of influencing in any way the action of a Federal Home Loan Bank. The proscriptions of 18 U.S.C. §1001 are not limited to false statements made to a federal bank, but rather prohibit false statements from being made in any matter within the jurisdiction of any department or agency of the United States. Although it may seem that the principles of venue as they apply to these two statutes could be different, it is noteworthy that the government does not make such a contention. The reason for this omission is simple: venue under the successor statute of 12 U.S.C. §1441(a), 18 U.S.C. §1014, is determined by reference to the same legal principles that apply to violations of 18 U.S.C. §1001. *See United States* v. *Wuagneux,* 683 F.2d 1343, 1356 (11th Cir. 1982), *cert. denied,* ____ U.S. ____, 104 S.Ct. 69 (1983); *United States* v. *Ruehrup,* 333 F.2d 641 (5th Cir.), *cert. denied,* 379 U.S. 903 (1964).

In reaching the conclusion that the general rule of venue is the same under the various false statement and false claim statutes, the Eleventh Circuit in *Wuagneux, supra,* expressly referred to 18 U.S.C. §1001. Thus, it cited to both *United States* v. *Heberman,* 583 F.2d 222 (5th Cir. 1978) (violation of 18 U.S.C. §1001) and *United States* v. *Blecker,* 657 F.2d 629 (4th Cir. 1981), *cert. denied,* 454 U.S. 1150 (1982) (violation of 18 U.S.C. §287) as examples as to which statutes this general venue rule applies.

Furthermore, although the statute involved in the *Reass* case was repealed, the viability of its rationale and holding is evidenced by its continued citations. Thus, in holding that venue for a violation of 18 U.S.C. §287 was appropriate in both the

district where the false statements were delivered to an intermediary of the defendant and in the district where they ultimately came to rest, the Fourth Circuit said its holding in *Reass* was that:

> venue [was] restricted to [the] Eastern District of Pennsylvania in which the defendant hand delivered [a] false statement for [the] purpose of influencing action of the Federal Home Loan Bank in violation of 12 U.S.C. §1441(a).

United States v. *Blecker*, 657 F.2d 629, 632-33 (1981), *cert. denied*, 454 U.S. 1150 (1982). It ultimately distinguished *Reass* on its facts, thereby reaffirming its continued viability, by pointing out that "in *Reass* we expressly refused to pass on the question 'whether the offense would have been recognizable in West Virginia, if the defendant had entrusted the applications to the mails in Wheeling for delivery to the bank in Pittsburgh.'" *Id.* at 633 quoting *Reass, supra*, 99 F.2d at 755.

Moreover, *Reass* was relied upon in *United States* v. *Flaxman*, 304 F. Supp. 1301 (S.D.N.Y. 1969) in holding that venue for a violation of 18 U.S.C. §1001 was proper only in the district where the defendant physically delivered false forms to a lending institution even though the lender ultimately mailed them to another district. In rejecting the government's argument that venue was appropriate in the district which ultimately received the forms the court stated:

> It is correct that the crime was not complete until the forms passed into the hands of the VA. It is equally true that that event took place in the Southern District. If the defendant had mailed those forms to Manhattan himself or if the lender had been indicted as a conspirator with the defendant, this argument might well carry the point. *Compare Reass* v. *United States*, 99 F.2d 752 (4th Cir. 1938).
>
> But the present case is more complex than that. The defendant completed his active role in the crime in the East-

> ern District of New York. There the forms were handed over to the lender . . . and it was the lender who sent the forms to the VA office in Manhattan.

Id. at 304 F. Supp. at 1303-04.

Thus, although the United States chose to ignore the significance of the holding in *Reass*, its continued viability cannot be questioned, particularly in the Fourth Circuit. *See also United States* v. *Mischlich*, 310 F. Supp. 669 (D.N.J. 1970), *aff'd on other grounds*, 445 F.2d 1194 (3d Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); *United States* v. *Borow*, 101 F. Supp. 211 (D.N.J. 1951).

The government also suggests that the distinction drawn by the courts between hand delivered filings and filing by mailing is "novel". As noted above, the majority of courts addressing this issue have drawn this distinction for sound reasons.

Section 1001 is designed "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described" in the statute. *United States* v. *Shanks*, 608 F.2d 73, 75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1048 (1980), quoting *United States* v. *Gilliland*, 312 U.S. 86 (1941). Consequently, the proscribed crime is not the planning or preparation to deceive the USDA, but rather the presentation of the falsified documents to the USDA. For without such presentation the capability of perverting the governmental function listed above would not exist.

Section 1001 prohibits the making of false statements "in any matter within the jurisdiction of any department or agency of the United States." As recently recognized by this Court in *United States* v. *Yermian*, 35 Cr.L.R. 3172 (No. 83-346, June 27, 1984), this phrase sets forth a "jurisdictional requirement" and "[i]ts primary purpose is to identify the factor that makes the false statement an appropriate subject of federal concern."

Yermian, supra, 35 Cr.L.R. at 3174. Until the false document is presented, or at least irretrievably forwarded, to the federal government no offense can be committed because it does not become a matter within the jurisdiction of the United States. *Travis* v. *United States,* 364 U.S. 631 (1961); *DeRosier* v. *United States,* 218 F.2d 420 (5th Cir. 1955); *United States* v. *Mischlich,* 310 F. Supp. 669 (D.N.J. 1970), *aff'd on other grounds* 445 F.2d 1194 (3d Cir. 1971), *cert. denied,* 404 U.S. 984 (1971). *See also United States* v. *Bithoney,* 472 F.2d 16 (2d Cir.), *cert. denied,* 412 U.S. 938 (1973).

Courts have upheld venue in the district of mailing because once a document is mailed, the crime is set in motion and its commission becomes irrevocable. *DeRosier* v. *United States, supra; Bithoney, supra.* When personal delivery is involved, however, the document does not become a matter of federal concern until it is received, because until that time, the defendant has a choice to refrain from committing the crime. *Id. See also, United States* v. *Wuagneux,* 683 F.2d 1343, 1156 (11th Cir. 1982), *cert. denied,* ____ U.S. ____, 104 S.Ct. 69 (1983) (the general rule of venue under the various false statement and false claims statute is that *"a crime is indictable in the district where the false statement is prepared and mailed* or where the statement is received") (emphasis added); *United States* v. *Williams,* 437 F. Supp. 1047 (W.D.N.Y. 1977) (in holding the multiple venue statute applicable because a mailing was involved the court distinguished *Reass* v. *United States,* 99 F.2d 752 (4th Cir. 1938) because *Reass* involved the personal delivery of the false document to a district other than the district in which it was prepared).

In this light, it is noteworthy that almost all of the Section 1001 cases in which multiple venue statutes have been applied to permit prosecution in the district in which the document was prepared also involve a mailing of the false document from that district to the agency involved. *See, e.g., United States* v. *Herberman,* 583 F.2d 222 (5th Cir. 1978); *Haddad* v. *United*

States, 349 F.2d 511 (9th Cir.), *cert. denied*, 382 U.S. 896 (1965); *United States* v. *Miller*, 246 F.2d 486 (2d Cir. 1957); *DeRosier* v. *United States*, 218 F.2d 420 (5th Cir. 1955); *United States* v. *LaBar*, 506 F. Supp. 1267 (1981), *aff'd*, 688 F.2d 826 (3d Cir. 1982); *United States* v. *Williams*, 437 F. Supp. 1047 (W.D.N.Y. 1977). In these cases it is stressed that the crime actually commences at the time of the mailing, for it is the act of mailing, as opposed to the mere preparation of the forms, which makes the crime irretrievable.

Thus, what the government attempts to depict as a "novel" theory is well grounded both in reason and precedent. The Second Circuit opinion deviates from the majority approach, thereby creating a split in the circuits which should be resolved by this Court.

The government's discussion of *Travis, supra,* is equally deficient for it fails to even recognize that various circuits have given this Court's holding in the case differing interpretations. As outlined in the petitioners' main petition, these interpretations of *Travis* are, at least, three-fold. First, the method of filing controls. Second, the crime is committed at the time of filing only if Congress specifies the place for filing. Lastly, that the holding in *Travis* is limited to statutes which state that filing is a condition precedent to federal jurisdiction.

Indeed, a careful review of the government's discussion of *Travis* reveals that it interprets the case's holding differently than the Second Circuit did in the case at bar. Thus, the government took the position that *Travis* only applies to statutes in which the filing is made a condition precedent to federal jurisdiction. The Second Circuit's opinion in the case at bar, however, adopted an intermediate interpretation of *Travis*—that the holding was limited to statutes where "the locus of the offense ha[d] been carefully specified; and only the single act of having a false statement at a specified place [was] penalized." *United States* v. *Ernest Mendel and Albert Mendel & Son, Inc.*, No. 84-1098, slip op. at 6716, (2d Cir. Oct. 16, 1984).

This Court should therefore grant the petition for a writ of certiorari filed by Ernest Mendel and Mendel & Son to clarify the scope of its holding in *Travis, supra,* and thereby provide a uniform interpretation to be followed by all the circuits.

II. The government's response to the petitioners' contention that the conviction of Mendel & Son should have been vacated because of a due process violation is also without merit. In arguing that the Second Circuit had no difficulty finding that Mendel & Son, acting through its employees, made and used the reports and statements in question and delivered them to Albany, the government ignores petitioners' central point. Simply put, neither the district court nor the Second Circuit found that any specific individual, besides Ernest Mendel, bound Mendel & Son. Without a specific finding that anyone else bound the corporation, the right to fair trial enjoyed by Ernest Mendel and Mendel & Son become inextricably bound. Thus, insofar as Ernest Mendel was the only one found to have knowledge of the falsity of the statements, if his rights to a fair trial were violated so too were the rights of the corporation.

Rather than being simply a minor factual question, as suggested by the government, this issue raises important due process concerns. These concerns can only be addressed by the granting of this petition for a writ of certiorari.

Conclusion

For the foregoing reasons, and for the reasons set forth in the petitioners' main petition, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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